

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Appellant,

v.

ANDREW DELGADILLO,

Defendant and Respondent.

A144207

**(San Mateo County
Super. Ct. No. NF431700A)**

The trial court dismissed a third prosecution against Andrew Delgadillo, concluding Penal Code section 1387's¹ "two dismissal rule" barred the prosecution and section 1387.1, an exception to the two dismissal rule, did not apply. The People appealed, and the parties' briefs discussed whether the error necessitating the second dismissal — the court's erroneous continuance of Delgadillo's preliminary hearing beyond section 859b's 60-day limit — was "due solely to excusable neglect" as defined in section 1387.1. We requested and received supplemental briefing on whether the second dismissal qualified as a "termination" for purposes of the two dismissal rule (§ 1387, subd. (c)(1)).

Having considered that briefing, we reverse. We conclude the dismissal necessitated by the court's failure to hold Delgadillo's preliminary hearing within 60 days

¹ Unless noted, all further statutory references are to the Penal Code.

as required by section 859b did not constitute a “termination” under section 1387 and, as a result, was not a bar to further prosecution.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying the charges against Delgadillo are not relevant to the issue on appeal.

First Dismissal

In October 2012, the prosecution filed an indictment against Delgadillo alleging conspiracy to commit first degree murder (§§ 182, subd. (a)(1), 187, subd. (a)), attempting to murder a police officer (§§ 187, subd. (a), 664, subd. (e)) and assaulting a police officer with a firearm (§ 245, subd. (d)(1)). In May 2014, the court granted the People’s motion to dismiss for lack of prosecution (§ 1385) and dismissed the indictment.

Second Dismissal

Shortly thereafter, the prosecution filed a complaint alleging the same offenses against Delgadillo and three codefendants. At the May 28, 2014 arraignment, the codefendants waived their right to a speedy preliminary hearing (§ 859b) but Delgadillo did not, requiring the court to hold Delgadillo’s preliminary hearing within 60 days, and no later than July 27, 2014.² The court set a June 2014 preliminary hearing date. In early June 2014, however, the codefendants moved to continue the preliminary hearing to August 2014 pursuant to section 1050.1.³

At the hearing on the motion to continue, the court asked, “Can I assume that all four [defendants] are joining in this?” and counsel for Delgadillo responded, “No, you

² Section 859b provides in relevant part: “The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceeding . . . , unless the defendant personally waives his or her right to a preliminary examination within the 60 days.”

³ Section 1050.1 provides in relevant part: “[i]n any case in which two or more defendants are jointly charged in the same complaint, . . . and the court or magistrate, for good cause shown, continues the . . . preliminary hearing, . . . of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants’ cases so as to maintain joinder.”

cannot, your Honor, . . . with respect to Mr. Delgadillo. Mr. Delgadillo does not want to waive time.” Counsel for a codefendant remarked, “that’s the reason I made the motion under [section] 1050.1. We [have] four thousand pages of discovery.” The court responded: “[m]otion to continue, one, is good cause to continue all to keep them together” and Delgadillo’s counsel replied, “I recognize that.” The court stated, “And that’s what we’ll do. Mr. Delgadillo doesn’t have to waive time. I can just reset it.”

The codefendants indicated they agreed to an August 20, 2014 preliminary hearing date and the prosecutor replied, “the People agree to the continuance as well as there’s good cause[.]” The court set the preliminary hearing for August 20. It noted “Mr. Delgadillo does not wish to waive time; however, under [section] 1050.1 [the preliminary hearing] is reset for August 20[.]” The court entered a time waiver for the codefendants but “not as to Mr. Delgadillo,” noting he would “have to go along with the program.”

At the preliminary hearing, Delgadillo moved to dismiss the complaint, arguing section 859b prohibited holding the preliminary hearing more than 60 days after the arraignment, and that a “showing of good cause” under section 1050.1 could not “set it out after the 60th day[.]” The court indicated its “inclination” to deny the motion “in light of the fact that good cause was found to continue . . . under [section] 1050.1” and later denied the motion to dismiss, concluding “[a] finding of good cause was made to continue the matter[.]” Delgadillo’s counsel responded: “[a] finding of good cause under [section] 1050.1 . . . cannot carry over past the 60th calendar day. And in doing so, it violated Mr. Delgadillo’s right to a speedy preliminary hearing. . . .” The court held the preliminary hearing. At the conclusion of the preliminary hearing, the court held Delgadillo to answer the charges and the prosecution filed an information.

Delgadillo moved to dismiss the information pursuant to section 995, again arguing the court violated section 859b. The prosecution conceded the preliminary hearing was improperly continued beyond section 859b’s 60-day limit and the court dismissed the information.

Third Dismissal

In late October 2014, the prosecution filed a complaint against Delgadillo for the same offenses. The complaint also charged Delgadillo with participation in a criminal street gang (§ 186.22, subd. (a)) and vehicle theft (Veh. Code, § 10851, subd. (a)) and alleged various sentencing enhancements. As relevant here, Delgadillo moved to dismiss, arguing section 1387 barred the prosecution from filing a third complaint because there were “two prior qualifying terminations[.]” In opposition, the prosecution claimed section 1387.1 authorized the third prosecution because the second dismissal was due to “excusable neglect.” Following a hearing, the court granted Delgadillo’s motion and dismissed the complaint, determining there was no “excusable neglect” under section 1387.1.

DISCUSSION

The issue in this case is whether the second dismissal — necessitated by the continuance of the preliminary hearing beyond the 60-day period in section 859b — constitutes a qualifying “termination” barring further prosecution under section 1387. The answer is no.⁴

I.

Sections 859b and 1050.1

To place the issues in context, we describe the statutory scheme. Section 859b “governs the timing of a defendant’s preliminary hearing and establishes the statutory right, . . . to a preliminary hearing at the earliest possible time.” (*Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 727-728 (*Ramos*).) As relevant here, the statute

⁴ Without citing any authority, Delgadillo contends “[a]ny argument by the People that there were not two prior dismissals should be considered forfeited or waived.” We disagree. Whether the second dismissal is a qualifying “termination” under section 1387 presents a pure issue of law and is not forfeited by the People’s failure to raise it in the trial court. Application of the forfeiture rule is not automatic. “An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party.” (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6.)

creates “an outside limit on when the preliminary hearing may be held, the 60-day rule . . . , and establishes the consequence of dismissal when the hearing is set or continued beyond the 60-day period: ‘The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment . . . , unless the defendant personally waives his . . . right to a preliminary examination within 60 days.’ (§ 859b, subd. (b).)” (*Id.* at p. 728, fn. omitted.)

Section 1050.1 provides in relevant part: “In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the . . . preliminary hearing . . . of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants’ cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time.”

Section 1050.1 does *not* create an exception to section 859b’s “mandatory 60-day rule in cases in which multiple defendants are jointly charged in a single complaint[.]” (*Ramos, supra*, 146 Cal.App.4th at pp. 730, 731 [“[w]hether or not good cause exists to continue the hearing, absent a personal waiver, the 60-day limit is a bar to extending the hearing date”]; see also *People v. Lind* (2014) 230 Cal.App.4th 709, 716.) In other words, “there is no good cause exception to the defendant’s right to a preliminary examination within 60 days of the arraignment[.] Therefore, a request for a continuance by one jointly charged co-defendant, which justifies a delay in that defendant’s examination, cannot be attributed to the other co-defendant pursuant to section 1050.1, and the magistrate may not set or continue the preliminary examination for the second co-defendant beyond the 60-day limit [citation].” (Simons, Cal. Preliminary Examinations and 995 Benchbook: Statutes and Notes (2016 ed.) § 1.1.21, p. 1-19 (Simons).)

II.

The Second Dismissal Did Not “Count” for Purposes of the Two Dismissal Rule in Section 1387

In the second prosecution, the codefendants waived their right to a speedy preliminary hearing (§ 859b) but Delgadillo did not, requiring the court to hold Delgadillo’s preliminary hearing within 60 days. To maintain joinder, the court continued his preliminary hearing beyond the 60-day statutory period in section 859b, concluding there was good cause for the continuance under section 1050.1. The court’s failure to hold Delgadillo’s preliminary hearing within 60 days was erroneous and necessitated the dismissal of the second accusatory pleading.

Section 1387 — commonly referred to as the “two dismissal rule” — permits a felony charge to be dismissed and refiled once, but not twice. Under section 1387, an “order terminating an action pursuant to this chapter, or Section 859b . . . or 995, is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to this chapter, or Section 859b . . . or 995[.]” (§ 1387, subd. (a); *People v. Mason* (2006) 140 Cal.App.4th 1190, 1195.) “Two dismissals ‘bar any other prosecution for the same offense.’ [Citation.]” (*People v. Juarez* (2016) 62 Cal.4th 1164, 1167 (*Juarez*), citing § 1387, subd. (a).) Section 1387 “provides a procedural safeguard against multiple prosecutions for the same offense.” (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 747.)⁵

Where a prosecution is dismissed for continuing the preliminary hearing in violation of section 859b’s 60-day rule, but there was “good cause” for the continuance, section 1387 does not bar further prosecution for the same offense. (§ 1387, subd. (c)(1)). “Pursuant to section 1387, ‘if the previous termination was pursuant to Section 859b . . . or 995, the subsequent order terminating an action is *not a bar to prosecution* if:

⁵ The People do not contend the charges are not for the “same offense.” (See, e.g. *Juarez, supra*, 62 Cal.4th at p. 1174 [defining “same offense”].) The third accusatory pleading charged Delgadillo with participation in a criminal street gang (§ 186.22, subd. (a)) and vehicle theft (Veh. Code, § 10851, subd. (a)), and alleged sentencing enhancements not alleged in the first or second prosecutions.

[¶] (1) Good cause is shown why the preliminary examination was not held within 60 days from the date of arraignment or plea.’ (§ 1387, subd. (c)(1).) Section 1387, subdivision (c)(1), thus necessarily recognizes that a felony complaint will be dismissed pursuant to section 859b if the preliminary hearing is not held within 60 days of the arraignment even though good cause existed for setting the preliminary hearing beyond the 60-day limit. Recognizing both the mandatory nature of section 859b’s 60-day rule and its potential harshness, section 1387 limits the impact of the mandatory dismissal by providing a good-cause finding prevents a section 859b dismissal from operating as a bar to further prosecution.” (*Ramos, supra*, 146 Cal.App.4th at p. 732, italics added.)

Because the court found good cause to continue the preliminary hearing beyond the 60-day period in section 859b, the second dismissal “does not count” as one of the two dismissals under section 1387, subdivision (b)(1). (*Simons, supra*, §§ 4.4.4, p. 4-16, 1.1.11, p. 1-9; *Ramos, supra*, 146 Cal.App.4th at p. 732 [“a proper finding of good cause to continue . . . would have precluded use of the mandatory dismissal as a prior termination under section 1387”].) Delgadillo’s argument to the contrary is not persuasive. As a result, section 1387 did not bar refiling of the charges against Delgadillo because the second dismissal was not a qualifying “termination” under the statute. (§ 1387, subd. (c)(1); *Simons, supra*, § 4.4.1, p. 4-14; *Crockett v. Superior Court* (1975) 14 Cal.3d 433, 437 [“timely refiling of charges once dismissed for denial of a speedy trial has been deemed constitutionally permissible absent a showing by the accused of actual prejudice”].) Having reached this result, we need not determine whether the court’s continuance of the preliminary hearing beyond the 60-day limit in violation of section 859b constitutes “excusable neglect” under section 1387.1.

DISPOSITION

The judgment of dismissal is reversed and the matter is remanded for further proceedings consistent with our decision.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.